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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 597 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

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2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

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4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

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5. Whether it is to be circulated to the Civil Judge? No

IDRISMIYA MUKHATYAR AHMED SAIYAD

Versus

KALUSINH ADITRAM BARIYA & ORS.

Appearance:

Shri V.C. Desai, Advocate, for the Appellant

Respondent No.1 served

Respondent No.2 (the Appeal against him was dismissed for non-prosecution)

Shri S.T. Mehta, Addl. Public Prosecutor, for Respondent No. 3-State

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CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 04/12/96

ORAL JUDGEMENT

The judgment and order of acquittal passed by the learned Judicial Magistrate (First Class) at Kapadwanj on 14th May 1986 in Criminal Case No. 149 of 1978 is under challenge in this appeal at the instance of the original complainant - the Food Inspector - of the Municipal area of Kapadwanj at the relevant time after obtaining special leave under sec. 378(4) of the Code of Criminal Procedure, 1973 (the Code for brief). Thereby the learned trial Magistrate acquitted respondent No.1 herein of the offences punishable under the relevant provisions contained in sec. 2(1) and 7(i) read with sec. 16(1-A)(i) of the Prevention of Food Adulteration Act, 1954 (the Act for brief).

2. The facts giving rise to this appeal move in a narrow compass. The appellant was working as Food Inspector for the municipal area of Kapadwanj at the relevant time. He went to one Janata Dairy situated at Malivada in Sevalia taluka Thasra at about 10.55 a.m. on 5th December 1977. That shop belonged to respondent No.2 herein. It was managed by his servant who is arraigned as respondent No.1 in this appeal. The appellant Food Inspector purchased 600 gms. of curd for the purpose of its analysis in accordance with the relevant provisions contained in the Act and The Prevention of Food Adulteration Rules, 1955 (the Rules for brief). That sample was divided into three equal parts and in each part was added the preservative by the name of formalin of 16 drops. The samples were properly placed in three different containers and the containers were sealed according to law. One sample was sent to the Public Analyst at Vadodara for his analysis and report. The report of the Public Analyst was received and it showed the sample to be highly adulterated. As against the prescribed minimum contents of the percentage of milk fat to the tune of 6%, the contents thereof were found to be a meagre 0.6%. The sample was found deficient qua milk solid non-fats as well. After obtaining the necessary sanction, the appellant-Food Inspector filed his complaint in the Court of the Judicial Magistrate (First Class) at Kapadwanj on 27th January 1978. Its due notice to respondents Nos. 1 and 2 herein was also served in accordance with sec. 13 of the Act on 3rd February 1978. It came to be registered as Criminal Case No. 149 of 1978. It appears that respondent No.1 herein was arraigned as accused No.2 and respondent No.2 was arraigned as accused No.1. Accused No.1 could not be served even after the issue of non-bailable warrants by the learned trial Magistrate. By one order passed below

the application at Ex. 8 on 5th January 1985, the trial of accused No.1 was separated from the trial of accused No.2 (respondent No.1 herein). The charge against respondent No.1 as accused No.2 was framed on 17th January 1986. He did not plead guilty to the charge. He was thereupon tried. After recording the prosecution evidence and after recording the further statement of respondent No.1 herein under sec. 313 of the Code and after hearing arguments, by his judgment and order passed on 14th May 1986 in Criminal Case No. 149 of 1978, the learned Judicial Magistrate (First Class) at Kapadwanj acquitted respondent No.1 herein of the offences with which he was charged. That aggrieved the appellant Food Inspector. He has therefore invoked the appellate jurisdiction of this Court after obtaining its special leave under sec. 378(4) of the Code by means of this appeal.

3. As aforesaid, respondent No.2 herein as accused No.1 in the trial court could not be served despite issue of non-bailable warrants. His trial therefore came to be separated from respondent No.1 herein as accused No.2. It appears that, through oversight, the learned trial Magistrate in his impugned judgment and order has shown the presence of both the accused. That is how in the memo of appeal both the accused were arraigned as respondents Nos. 1 and 2 for the purpose of this appeal. Respondent No.2 herein could not be served. The appeal against him was therefore dismissed for non-prosecution. I think he ought to have been ordered to be deleted from the record of the case as his trial was separated from respondent No.1 as accused No.2 in the trial court as aforesaid. The presence of respondent No.2 for the purpose of this appeal was therefore not necessary. Anyway, dismissal of this appeal against respondent No.2 herein for non-prosecution will be of no consequence and it would be open to the learned trial Magistrate to proceed against him and to try him as and when he could be made available for the purpose.

4. Respondent No.1 herein has chosen to remain ex-parte though duly served. He has not made any request for any legal aid or assistance. I have therefore not thought it fit to avail of services of any advocate to assist this court on his behalf for the purpose of this appeal.

5. Learned Advocate Shri Desai for the appellant is right in his submission that, after negativing the contention urged on behalf of respondent No.1 herein at the trial, no presumption under sec. 114 Illustration

(e) of the Evidence Act, 1872 was drawn. The learned trial Magistrate has, with respect, acted contrary thereto. The learned trial Magistrate appears to have lost sight of the Division Bench ruling of this Court in the case of Kamleshkumar Babulal Patel v. The State of Gujarat and another reported in 1981 G.L.H. 98 in this regard.

6. Learned Advocate Shri Desai for the appellant is also justified in voicing his grievance that certain omissions in the copy of the complaint given to the accused were unduly and unnecessarily highlighted. With respect, the learned trial Magistrate appears to have lost sight of the definition of the term "complaint" contained in sec. 2(d) of the Code. It would have been better if the learned trial Magistrate had also kept in mind the binding ruling of the Supreme Court in the case of Bhimappa Bassappa Bhu Sannavar v. Laxman Shivarayappa Samagouda and others reported in AIR 1970 SC 1153 pointing out therein that the word "complaint" has a wide meaning since it includes even an oral allegation and it may therefore be assumed that no form is prescribed which the complaint must take. The learned trial Magistrate could have looked at the ruling of the Patna High Court in the case of Halimuddin Ahmad v. Ashoka Cement Ltd. reported in 1976 Criminal Law Journal 449. It has been held therein that it would not be necessary for a complainant to set out in his complaint all the evidence in his possession. The ruling of the Kerala High Court in the case of P. Raveendran Thampi v. Sadasivan and another reported in 1981 Criminal Law Journal 181 in this regard also deserves to be noted. It has been held therein that it would be sufficient for the Food Inspector to state in his complaint the necessary facts constituting an offence punishable under the Act.

7. Besides, certain omissions in the copy of the complaint given to the accused would not by themselves vitiate the trial and result in acquittal of the accused unless prejudice caused thereby to him is shown at trial. In absence of any prejudice caused, certain omissions in the copy of the complaint given to the accused would not be material. It appears that the learned trial Magistrate has unduly highlighted certain omissions in the copy of the complaint given to the accused also for reaching his conclusion in favour of the accused.

7. It appears that respondent No.1 herein was perfunctorily questioned under sec. 313 of the Code. Only two questions were put to him with respect to the evidence of the two prosecution witnesses. What was

asked to the accused under sec. 313 of the Code was what he had to say with respect to their oral testimonies and nothing more. It is too obvious to bring to the notice of the learned trial Magistrate that the aforesaid statutory provision in the Code requires the trial court to bring to the notice of the accused each and every incriminating circumstance appearing on the record to seek his explanation. Non-compliance therewith would certainly seriously prejudice the accused and might vitiate the ultimate conclusion reached against him or in his favour. It is not necessary to highlight this point by reference to any binding ruling of the Supreme Court. If necessary, a reference may be made to the binding ruling of the Supreme Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra reported in AIR 1984 SC 1622. The law on the subject has been declared by the Apex Court in its aforesaid binding ruling.

8. It is not possible for me to alter the order of acquittal and to convert it into conviction in absence of any proper questioning of the accused under sec. 313 of the Code. I have therefore not elaborately dealt with the merits of the case except referring to the binding and the persuasive rulings to be kept in mind. It would be desirable to remand the matter to the learned trial Magistrate for retrial from the stage of seeking explanation of the accused with respect to each and every incriminating circumstance under sec. 313 of the Code and to decide the matter afresh thereafter in the light of the binding and the persuasive rulings referred to hereinabove and any other ruling or rulings that may be cited at the bar by either side.

9. It appears that respondent No.2 herein as accused No.1 at trial has wilfully avoided attending the Court for the purpose of facing the trial. In all probability he might now be attending to his shop from where the appellant Food Inspector had collected his sample for the purposes of the Act. It appears that he went underground in order to evade service of even non-bailable warrants issued against him by the learned trial Magistrate. It appears that the learned trial Magistrate has lost sight of the relevant provisions contained in sections 82 and 83 of the Code for securing attendance of the absconding accused. On remand the learned trial Magistrate may keep the aforesaid statutory provisions in mind in case the attendance of respondent No.2 herein as accused No.1 at trial could not be secured by ordinary means or by issue of bailable or non-bailable warrants. If necessary, it would be open to the learned trial Magistrate to reopen

the entire trial against both the accused. The learned trial Magistrate must keep in mind that the offences punishable under the Act are serious in nature as they are in the nature of health hazards and the offender can be said to be playing with the lives of people thereby. In its ruling in the case of State of U.P. v. Hanif reported in AIR 1992 SC 1121 the Supreme Court has refused to show leniency even in the matter of sentence qua the offender for the crimes punishable under the Act even on the ground of long lapse of time.

10. Though it is not necessary, it is clarified that, if the attendance of original accused No.1 could be secured by ordinary means or by issue of bailable or non-bailable warrants or by resorting to the relevant provisions contained in section 82 and/or 83 of the Code, the entire trial should be reopened by the learned trial Magistrate. In that case, the order passed below the application at Ex. 8 may be treated as having been set aside by this Court in exercise of its powers under sec. 482 of the Code. If, for the reasons beyond comprehension, the attendance of original accused No. 1 could not be secured at trial, the case may be reopened from the stage of the questioning of accused No.2 under sec. 313 of the Code.

11. In the result, this appeal is accepted. The judgment and order of acquittal passed by the learned Judicial Magistrate (First Class) at Kapadwanj on 14th May 1986 in Criminal Case No. 149 of 1978 is quashed and set aside. The matter is remanded to the trial Court for restoration of the proceeding to file and for its further proceeding according to law in the light of this judgment of mine.
